

CASE LAW SUMMARIES

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JUNE 2015 WCCA DECISIONS

Giel v. Edelweiss Design, Inc., Self-Insured, Meadowbrook Claims Servs. WC14-5778 (June 19, 2015)

CAUSATION-TEMPORARY INJURY. Substantial evidence, including expert medical opinion, medical records, and lay testimony, support the compensation judge's finding that the employee's work injury was temporary in nature.

Peterson v. Indep. Sch. Dist. No. 492 and SFM Mut. Ins. Co., WC14-5771 (June 25, 2015)

CAUSATION-TEMPORARY AGGRAVATION. Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee sustained a temporary aggravation of a pre-existing lumbar spine condition as a result of his March 22, 2012, work injury.

Van Riper v. Interstate Packaging, Inc. WC14-5767 (June 6, 2015)

NOTICE OF INJURY-GILLETTE INJURY. The employer and insurer appealed the compensation judge's rejection of their notice defense. They further appealed the employee being awarded wage loss based on employee's voluntary departure from her employment. Finally, the employer and insurer asked the court to vacate the compensation judge's finding of a 25 percent permanent partial disability.

The employee worked for a manufacturer of corrugated board, which involved repeatedly reaching overhead. The employee began to notice pain in her right and left shoulder. The employee sought medical treatment, but did not inform her employer, stating that she did not understand she was obligated to report an injury that came on gradually.

The employer claims that at one point while working, the employee informed her employer of pain symptoms and that she wanted to go home, the employer asked Van Riper to wait while they finished with a customer. Van Riper did not wait and went home. She was terminated at her next workday for leaving a can of paint open and previously leaving work without permission.

After being terminated, the employee's physician opined that the employee had suffered a Gillette-type injury from the repetitive activities she had performed at her job. The physician assigned a 25% PPD rating.

The WCCA determined that substantial evidence had existed to support the compensation judge's conclusion that the employee had suffered a Gillette-type injury to both shoulders.

In terms of notice, the WCCA concluded that the employee had credibly testified that she was unaware that the gradual worsening of her shoulders could lead to a compensable injury or one that could be reported to her employer. The employee claimed she did not report the injury because she could not pinpoint what was causing it and also feared being fired for reporting a work injury. The court determined, the employee gave adequate notice when she promptly notified the employer upon obtaining a report from the physician that identified the employee's condition as a Gillette-type injury.

The court also concluded that the employee had not abandoned her job and was entitled to wage loss benefits. The court noted that the employee had informed her employer of her pain and that her action of leaving the workplace to care for her injury was reasonable under the circumstances.

Finally, the court concluded that the employee had been prematurely rated at 25% PPD, based on 5 months after the rating the employee underwent surgery and her range of motion findings were normal.

Dunker v. Securitas Sec. Servs. USA, Inc., Self-Insured/Sedgwick Claims MGMT. Servs., Inc. WC14-5780 (June 29, 2015)

JURISDICTION-OUT-OF-STATE INJURY. The employee was hired as a security guard in Minnesota with a job offer assigning her to a position in Superior, Wisconsin. The employee applied for a "private security permit", which is required to work as a security guard in Wisconsin. The employee was assigned to Enbridge, an energy company in Superior as her job site. The employee was injured while at Enbridge less than four weeks into her employment.

The self-insured employer initially accepted liability for the work injury, considering it to be covered by Minnesota workers' compensation law. Subsequently the employer contended that Minnesota did not have jurisdiction over the employee's claims.

The WCCA determined that during the less than four week span of her employment at Securitas she worked 77.5 hours, of which 27 or roughly 35 percent was worked in Minnesota. The employee earned 45 percent of her wages in Minnesota. The WCCA concluded that the employee had regularly performed the primary duties of her employment as a security guard in Minnesota, establishing jurisdiction under Minn. Stat. § 176.041, subd. 2.

The court also considered whether the employee had been temporary employed outside of Minnesota at the time of her injury, as the facts established that the employer intended that the employee would be employed in Wisconsin after the permit had been received. However, WCCA concluded that no such permit had been received and that the employee was in a transition as to her employment when the injury occurred. Additionally, the WCCA concluded that during the employee's four week employment she had worked at two locations in Minnesota and one in Wisconsin and that her work assignments were made without regard for state boundaries, resulting in both Wisconsin and Minnesota being considered temporary with regard to location.

JULY 2015 WCCA DECISIONS

Muhonen v. New Horizon Academy and Travelers Indem. Co. of AM. WC14-5772 (July 1, 2015).

CAUSATION-SUBSTANTIAL EVIDENCE. Substantial evidence, including the adequately founded opinion of the employer and insurer's independent medical expert, supports the compensation judge's finding that the employee sustained a temporary cervical and thoracic injury only on January 26, 2010, with no lumbar injury on that date.

TEMPORARY TOTAL DISABILITY-SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee's time off work after November 2011 was not caused by or related to the January 26, 2010, injury and that the employee was not entitled to temporary total disability benefits.

Wessel v. State, Dep't of Human Servs. WC15-5789 (July 13, 2015)

PERMANENT TOTAL DISABILITY. Substantial evidence in the record supports the compensation judge's conclusion that, in light of the fact that the employee has not completed the recommended plan for treatment set forth by her treating physicians, it is premature to rate any emotional disability and that in the absence of such a rating, the employee has not met the permanent total disability threshold.

Beekman v. JPS Lawn Serv. And Farmers Ins. Group. WC15-5789 (July 16, 2015)

COSTS & DISBURSEMENTS. The employee's attorney petitioned the WCCA for taxation of costs and disbursements in the amount of \$517.00 related to an appeal before the court in February 2014. The WCCA determined that the petition was untimely under Minn. R. 9800.1700 and denied the petition.

The case originated out of the employer and insurer filing a petition to discontinue benefits seeking a credit for TTD benefits paid between April and May 2013. The compensation judge allowed the credit and the employee later successfully appealed.

The employee's attorney later filed a statement of attorney fees, claiming fees for representation at several administrative conferences and the hearing, as well as costs of \$517.00 related to the later appeal. A compensation judge awarded the claimed fees, but not the costs associated with the appeal on the basis that the issue of appellate costs were beyond her authority. The employee's attorney appealed to the WCCA.

The WCCA acknowledged that the right to recover costs on appeal exists by reason of statutory authority, the court concluded that the employee's attorney, in filing his petition for the taxation of disbursements 16 months after the final appellate decision had been served and filed was untimely and in turn denied the petition. Minn. R. 9800.1700 requires petitions to the WCCA for costs and disbursements to be filed within 45 days of the filing of the final appellate decision.

Melsness v. Overhead Door Co., and Cincinnati Ins. Co. WC15-5793 (July 17, 2015)

MEDICAL TREATMENT & EXPENSE-MEDICATIONS. The employer and insurer appealed the compensation judge's finding that the employee's use of Viagra as a vasodilator to treat his work-related reflex sympathetic dystrophy was reasonable and necessary. The WCCA affirmed, stating that the use of Viagra had reduced the employee's symptoms and also allowed him to reduce his dependence on opioids. The WCCA determined that while Viagra is not typically prescribed to address the usual conditions that arise from work injuries, the compensation judge carefully considered the unique evidence in this case and reached a conclusion supported by substantial evidence.

Ryan v. Potlatch Corp., Self-Insured. Comp Cost, Inc. (July 31, 2015)

SETTLEMENTS-INTERPRETATION; VACATION OF AWARD. The self-insured employer appealed from the compensation judge's determination that a 2003 award on stipulation, which had not been vacated, did not preclude the employee from bringing a claim for benefits from a psychological condition which arose as a consequence of the physical injury which was the subject of the stipulation for settlement, since the psychological condition was not within the parties' contemplation at the time of the 2003 stipulation for settlement.

The employee suffered a back injury while working at Potlatch Corp and she entered into a stipulation for settlement with the employer, which provided for a full, final and complete settlement of the employee's claims, with the exception of future reasonable and necessary medical treatment. The stipulation did not mention any claim for psychiatric or emotional symptoms associated with the low back injury. The employee's back condition progressed post settlement and the employee filed a claim petition asserting a claim for consequential depression/anxiety.

The employer and insurer admitted in their answer that the employee had sustained a psychological injury "as part of the original injury" and that they had made payments to pain clinics and for psychological treatment as a consequence of the injury.

The compensation judge denied the employer and insurer's request to dismiss the claim, stating that the preponderance of evidence supported the finding that the employee had developed a consequential psychological injury since the date of the stipulation which was not merely an extension of her psychological condition at the time of the stipulation.

The WCCA, relying on *Sweep v. Hanson Silo Co.*, 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986) stated that a prior stipulation for settlement does not close out claims from the same incident but not mentioned in the stipulation, absent evidence that the subsequent claims were contemplated by the parties when they entered into the stipulation. The employer argued that Sweep shouldn't apply in cases where the newly claimed condition was a "consequential injury" in comparison to a condition which was entirely distinct from the condition foreclosed in the stipulation.

The court concluded that past cases had not made such a distinction and had applied the same analysis to consequential conditions as to wholly distinct conditions. The WCCA stated the principle considered in this situation is predicated on whether a condition was reasonably within the contemplation of the parties at the time of the stipulation and not whether that condition was consequential or distinct from the settled condition.

JULY 2015 MN SUPREME COURT DECISIONS

Sumner v. Jim Lupient Infiniti. 865 N.W.2d 706 (July 8, 2015)

INTERVENTION APPEARANCES. The Minnesota Supreme Court held that the workers' compensation statute § 176.361 subd. 4, requires an intervenor in a workers' compensation case to appear at conferences and hearings.

The employee, Yer Sumner was injured while working at Jim Lupient Infiniti in Golden Valley. Lupient objected to eight of the eleven intervenors, including the two Relators, on the ground that their services they provided were not reasonable, necessary, or casually related to the injury. After filing their motions, the intervenors did not actively participate in the proceedings. None personally appeared at the hearing, received permission to be absent from the hearing, or filed a stipulation.

Following a 1-day hearing, the compensation judge issued an order in which he denied reimbursement to the Intervenor because they did not attend the hearing, relying on Minn. Stat. §176.361, subd. 4. The Relators and Sumner appealed the compensation judge's order to the WCCA, which affirmed the denial of reimbursement in a 2-1 decision.

The Minnesota Supreme Court held that first sentence of Minn. Stat. § 176.361, subd. 4, used the word "shall" to describe the attendance requirement, which creates a mandatory duty for intervenors to "attend all settlement or pretrial conferences, administrative conferences, and the hearing."

The court determined there are two scenarios in which attendance is unnecessary for an intervenor, first when the parties have signed and filed a stipulation establishing the intervenor's right to reimbursement and second when an insurer or self-insured employer fails to return a signed stipulation or to object to the claim within 30 days, at which point the intervenor's right to reimbursement is deemed established.

Mach v. Wells Concrete Products Co. No. 14-2065, 2015 WL 4464146 (July 22, 2015)

APPEAL AND ERROR-RES JUDICATA/COLLATERAL ESTOPPEL. Workers' compensation claimant sought review of decision of compensation judge determining that claim was barred by res judicata and collateral estoppel. The WCCA reversed and the employer appealed.

Employee suffered a work injury, claiming that as a result of the injury he developed reflex sympathetic dystrophy ("RSD"), now known as complex regional pain syndrome ("CRPS"). In his 2010 claim for workers' compensation benefits the judge concluded that the employee had failed to show that he suffered from CRPS and that a neurostimulator was a reasonable medical treatment for employee's work injury. The judge therefore denied the employee's claims for treatment related to the neurostimulator. The employee subsequently had surgery to remove his neurostimulator and have it replaced with a new one. He then filed a second request for benefits in 2013, seeking compensation for expenses related to the replacement.

The employer moved to dismiss the 2013 claim, arguing that the claim was barred by res judicata and collateral estoppel. The compensation judge granted the motion to dismiss and the WCCA reversed, based on medical bills from 2013 were not in front of the judge in 2013 when he made his ruling, and therefore the employee's claim was not barred by res judicata or collateral estoppel. The employer appealed.

The Minnesota Supreme Court held that because the employee's 2013 claim for treatment expenses occurred after the previous decision, the operative facts were not the same and that different evidence supported each claim. The court concluded based on this that the 2013 claim was not the same as the 2010 claim and was not barred by res judicata.

As for collateral estoppel, the court determined that collateral estoppel does not apply to bar a claim for reimbursement of medical expenses for treatment received when an employee's medical condition has changed. The compensation judge, in denying the 2010 claim, determined that the employee had failed to show that the effects of his work-related injury included CRPS and therefore necessitated a neurostimulator. Absent a change of condition or new facts, the employer should not be forced to undertake the expense of relitigating the matter and collateral estoppel would bar the 2013 claim. However, the court determined that in resolving the 2013 claim, the compensation judge did not determine whether the employee's medical condition had changed or new material facts had emerged and therefore concluded it was necessary to order further proceedings to determine whether collateral estoppel would preclude the 2013 claim.

AUGUST 2015 WCCA DECISIONS

Marschel v. Bird & Cronin, Inc. WC15-5794 (August 7, 2015)

MEDICAL TREATMENT & EXPENSE- TREATMENT PARAMETERS; MEDICAL TREATMENT & EXPENSE-SUBSTANTIAL EVIDENCE. Substantial evidence in the record supports the compensation judge's conclusion that, for the employee's three dates of injury, chiropractic treatment beyond that which is provided for in the treatment parameters is appropriate pursuant to the applicable treatment parameter provisions and departure provisions, including consideration of the rational set forth in *Jacka v. Coca Cola Bottling Co.*, 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998).

Shannon v. McCormick & Schmick's Seafood Restaurant, WC15-5792 (August 10, 2015)

TEMPORARY PARTIAL DISABILITY-EARNING CAPACITY. The WCCA concluded that where a part-time employee works longer hours than his normal weekly average for a period of time post-injury and obtains a temporary part-time job in addition to his usual employment, substantial evidence supports the determination that the employee failed to prove that he experienced an impairment in his earning capacity arising from his work injury and that would entitle the employee to an award of temporary partial disability benefits.

The employee was hired by McCormick & Schmick's Seafood Restaurant as a dishwasher, and no specific hours were promised. While working the employee fell while carrying dishes and suffered lacerations to his right elbow and right middle finger. He did not miss time from work after being treated. The employee worked overtime hours in the three pay periods following his injury. The employee's wages by pay period varied widely from August 2013 to January 2014, ranging from \$163.40 to \$959.75.

The employee filed a Claim Petition seeking temporary partial disability benefits for wage losses experienced from August 2013 to January 2014. The compensation judge denied the employee's claim petition, finding that he had not shown any impairment in his earning capacity to support an award of TPD.

On the appeal, the WCCA determined that the employee had not identified any instances where his physical condition was a factor in whether he was scheduled to work. During the time span that the employee claimed wage loss benefits, he was below his AWW on seven pay periods, but on several his wage was double his AWW from working overtime.

The WCCA concluded that the employee bore the burden of proof for showing that he had experienced a physical limitation arising from his work injury which had the effect of limiting his earning capacity. There was no evidence that the employee was prevented from performing the duties of his job. The employer had also presented evidence that the reduced hours given to the employee were from economic conditions and not any impairment arising from the work injury.

AUGUST 2015 MN SUPREME COURT DECISIONS

Allan v. R.D. Offutt Co., Self-Insured, A14-1555 (August 31, 2015)

ELIGIBILITY FOR PERMANENT-TOTAL-DISABILITY. The Minnesota Supreme Court concluded that for the purpose of determining eligibility for permanent-total-disability benefits, any disability that contributes to the employee's permanent-

partial-disability rating must also affect the employee's ability to "secure anything more than sporadic employment resulting in an insubstantial income."

The employee in this case sustained a work-related injury to his lower back. The employee filed a petition seeking permanent-total-disability benefits. Based on his age (48) he was required to demonstrate "at least a 17% permanent-partial-disability rating of the whole body" in order to qualify for permanent-total-disability benefits. The employee relied on his work-related back injury which was assigned a permanent-partial-disability rating of 10% and also on a non-work related complete loss of teeth, which was also assigned a 10% rating, bringing the employee's claimed permanent-total-disability rating to 20%.

The compensation judge concluded that the employee had established a 10% permanent-partial-disability rating, but did not consider the teeth, as they were fully corrected. The WCCA reversed and remanded, holding that the correctable nature of the employee's loss of teeth was irrelevant to whether that condition could contribute to his permanent-partial-disability rating.

The Minnesota Supreme Court held that Minn. Stat. § 176.101. subd. 5(2), "unambiguously requires that disabilities that contribute to an employee's permanent-partial-disability rating must affect employability." The court went on to further state, "Thus, subdivision 5(2) necessarily contains a casual nexus between employability and the work-related injury, and between employability and the disabilities that contribute to the permanent-partial-disability rating." The court, therefore, concluded that because the WCCA had not decided whether the employee's loss of teeth had affected his employability, the case would need to be remanded back for further proceedings.



Aafedt, Forde, Gray, Monson & Hager, P.A. will host its annual fall seminar on Friday, October 2, 2015, at the Minneapolis Marriott Southwest. The free educational seminar will address important changes in Minnesota workers' compensation law, including both case law and legislative developments. There will be general sessions and breakouts of interest for employers, insurers, and claims professionals. The seminar is from 8:00am—3:45pm with a reception immediately following. We hope to see you in October!

To learn more or to register, please contact Amie Allison via email at aallison@aafedt.com, or via phone at 612-339-8965